

## **7 FAM 420**

# **NOTIFICATION AND ACCESS**

*(CT:CON-435; 01-24-2013)*  
*(Office of Origin: CA/OCS/L)*

## **7 FAM 421 NOTIFICATION**

*(CT:CON-379; 06-09-2011)*

In order for you to perform your consular protective functions in an efficient and timely manner, it is essential that you receive prompt notification from local authorities whenever a U.S. citizen or national is arrested, although, as explained below, local authorities are not always required to inform you. Prompt notification is the necessary first step in obtaining early access to the arrestee and therefore you should take all steps to make sure you have good relationships with host country law enforcement contacts.

### **7 FAM 421.1 Authorities**

*(CT:CON-379; 06-09-2011)*

As described in detail in the Consular Notification and Access Manual, your authorities as a consular officer in this area stem from the obligations incurred by almost all host country governments under international treaties.

#### **7 FAM 421.1-1 Notification Under the Vienna Convention on Consular Relations (VCCR)**

*(CT:CON-379; 06-09-2011)*

Article 36 of the VCCR (see 7 FAM 412) provides that the host government must notify a foreign national arrestee without delay of the arrestee's option to communicate with his or her consular officials, and must notify the consular officials without delay if the arrestee so requests. The vast majority of countries are parties to the VCCR. (See the Consular Notification and Access Manual for a current list of parties to the VCCR (at Table C) and the language of Article 36.) The full text of the VCCR is available on the CA Web Intranet Guidance and Reference.

## **7 FAM 421.1-2 Notification under Bilateral Consular Conventions**

*(CT:CON-410; 07-09-2012)*

- a. Some of our bilateral consular agreements require that consular notification be made upon the request of the arrestee in terms similar to those in Article 36 of the VCCR. See Table B of the Consular Notification and Access Manual for a list of these.
- b. Other bilateral agreements require “mandatory notification;” i.e., the arresting authorities must promptly notify the consular officer of a foreign state of the arrest of a national of that state, whether or not the arrestee wishes such notification to be given.
  - (1) In some versions, consular notification must be given “immediately” or “without delay.”
  - (2) Sometimes notification must be provided not later than a specified number of days.
  - (3) Consult the Consular Notification and Access Manual for a list of mandatory notification countries as well as the time limits required in each.

## **7 FAM 421.1-3 Notification under Customary International Law**

*(CT:CON-379; 06-09-2011)*

While consular relations are now largely governed by the VCCR and bilateral agreements discussed above, the United States still looks to customary international law as a basis for insisting upon adherence to consular notification and access requirements by the small number of countries not yet party to the VCCR or any bilateral agreement with a provision on consular notification and access. The Department takes the view that consular notification and access upon request, as set forth in VCCR Article 36, is a universally accepted, basic practice that should be followed even for nationals of countries not party to the VCCR or other applicable bilateral agreements. Thus, in all cases not covered by a mandatory notification agreement, the minimum requirements are to inform an arrestee that his or her consular officers may be notified upon request; to notify these officers if the national so requests; and to permit the consular officers to provide consular assistance if they wish to do so.

## **7 FAM 421.2 Ensuring Prompt Notification**

*(CT:CON-90; 09-03-2004)*

Although the legal responsibility to give consular notification may rest with the arresting authorities, as a practical matter, you should take steps to create a working atmosphere conducive to prompt notifications. Actions on your part could include:

## **7 FAM 421.2-1 Developing Relationships**

*(CT:CON-379; 06-09-2011)*

- a. Know which local officials would normally be aware first of the arrest of a U.S. citizen or national (chiefs of police precincts, prison or jail wardens, public defenders, etc.).
- b. Cultivate strong working relationships with these individuals through regular contact, routine scheduled meetings, inclusion in representational events, etc.
- c. Commend particularly prompt notifications and extra effort in unusual cases with letters to supervisors, etc.
- d. Explore with CA, other Department bureaus, and USG agency reps. at post opportunities to send your contacts to relevant training programs.

FYI: Public Diplomacy, INL, PRM, and other agencies often conduct International Visitor or "capacity building" programs that have law enforcement or judicial components. Many, but not all, of these programs take place in the United States. See 10 FAM 216.

## **7 FAM 421.2-2 Educating**

*(CT:CON-379; 06-09-2011)*

- a. Ensure that arresting officials are aware of their responsibilities under the Vienna Convention and/or bilateral treaties and/or customary international law. Distribute copies of the appropriate sections as needed.
- b. Share the Department's Consular Notification and Access Manual with these individuals as appropriate and encourage them to adapt to their operations any relevant guidance it contains. The manual is intended to provide detailed guidance to U.S. Federal, State, and local law enforcement on their consular notification and access obligations, and on specific scenarios that arise most frequently in practice. Much of its guidance is readily adaptable to the operations of law enforcement agencies in other countries.
- c. Clarify that, for purposes of notification, the Department considers a U.S. citizen or national "under arrest" promptly after he or she is deprived of liberty by a foreign governmental agency or authority and is not free to leave, and the foreign governmental agency or authority ascertains that the person is a U.S. citizen or national.
- d. Explain that, in those cases where the arrestee claims to be a U.S. citizen or national, but has no documentation, you prefer to be notified immediately and given the opportunity to determine citizenship after the fact.
- e. Ask that you be notified of the arrest automatically, even in those countries where there is no bilateral treaty mandating notification even absent the arrestee's request.

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- f. Ask that you be notified even in those cases in which the arrestee initially states he/she does not wish to see or speak with a consul. Explain that you may well receive inquiries from family or friends, and that the arrestee may change his or her position after a period of incarceration.
- g. Explain that under customary international law, you must be notified upon the arrestee's request even in those countries where there is no bilateral agreement mandating notification.

## **7 FAM 421.2-3 Responding To Complaints Regarding Reciprocal Notification**

*(CT:CON-379; 06-09-2011)*

Occasionally, a host government official may counter with the claim that U.S. authorities do not always promptly notify that country's consular representatives of the arrest of one of their nationals. You can best deal with this by urging the host government to report such instances to the authorities who deal with consular notification and access at the Department (CA/P) if it has not done so already, and by pointing out:

- (1) Even where this might be true, it does not exempt the host government from its treaty and customary international law obligations. Two wrongs do not make a right. We should all work toward improved compliance with consular notification obligations.
- (2) The diverse makeup of the U.S. population can make it difficult to identify persons as foreign nationals unless they claim such nationality or have appropriate documentation.
- (3) The size and composition of U.S. law enforcement (local, county, State, Federal) make it difficult to ensure that every arresting official understands the obligation to notify foreign consuls.
- (4) The Department of State (CA/P) conducts an ongoing concentrated educational program in an effort to remedy this situation, including:
  - (a) Publishing the Consular Notification and Access Manual, which instructs Federal, State, and local law enforcement officials in the U.S. on their responsibilities and procedures regarding consular notification and access.
  - (b) Conducting seminars and appearing at various law enforcement meetings, conventions and similar gatherings in order to continue educating the law enforcement community in the United States of its obligations.
  - (c) Providing posters with appropriate instructions for display in jails, police stations and similar detention facilities in the United States.
  - (d) Providing specific guidance to individual questions posed by law

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enforcement officials in the United States.

- (e) Contacting responsible law enforcement officials in the United States when the governmental authorities of other countries allege that consular notification requirements were not observed in specific cases involving their nationals, and working with such officials to ascertain whether notification was or was not given, and to discuss ways to prevent violations from occurring in the future.

## **7 FAM 421.2-4 Establishing Efficient Communications**

*(CT:CON-90; 09-03-2004)*

Make certain local authorities can reach an appropriate officer quickly and easily. Remember, arrests do not just occur during business hours. Local authorities should have easy access to consular officers during the workday and to the appropriate duty officer contact after hours.

## **7 FAM 422 ACCESS**

*(CT:CON-379; 06-09-2011)*

Consular officers must make every effort to gain prompt personal access to an arrested U.S. citizen or national for a number of reasons:

- (1) Experience demonstrates that requesting prompt, personal access to the U.S. citizen or national assures both the arrestee and the host authorities of the serious interest of the U.S. Government in the case.
- (2) Anything less than your full efforts to obtain prompt access undermines our insistence that host country arresting authorities notify a U.S. consular officer without delay following the arrest.
- (3) Experience shows that abuse of a prisoner is most likely during the early arrest and pre-trial detention stages. Your prompt access to the detainee can often forestall physical abuse of the prisoner by the arresting and/or investigating authorities.
- (4) In instances where abuse has, or is alleged to have, already occurred, your prompt access to the prisoner permits possible visible verification and puts you in the best position to demand medical attention and/or verification, as well as demand a prompt investigation by appropriate authorities.
- (5) You can provide the arrestee with a list of reputable lawyers or information concerning local legal aid before the arrestee selects a lawyer who may not have the requisite level of competence.
- (6) You have the opportunity to explain the legal and judicial procedures of the host government and the detainee's rights under that government at a time when such information is most useful.

## **7 FAM 422.1 First Contact**

*(CT:CON-90; 09-03-2004)*

Upon receiving notification that a U.S. citizen or national is being detained, it is absolutely essential that you achieve timely access to the detainee through one of the following methods:

### **7 FAM 422.1-1 Personal Visit**

*(CT:CON-379; 06-09-2011)*

As consular officer, you are required to visit the arrestee as soon as possible following receipt of consular notification or information about the arrest from another source, such as the arrestee's family or the media.

### **7 FAM 422.1-2 Telephone Contact**

*(CT:CON-379; 06-09-2011)*

If a personal visit by an officer within 24 hours is not possible, you should contact the detainee by telephone. You should ask the detaining authorities to permit a private conversation. (In some countries the authorities are required to allow private conversations; see Consular Notification and Access Manual, p. 34, for the list.) Such contact does not eliminate your responsibility to follow up with a personal visit at the earliest possible opportunity, normally within a few days.

### **7 FAM 422.1-3 Visit By A Consular Agent**

*(CT:CON-379; 06-09-2011)*

- a. If a consular officer cannot do so, a Consular Agent should visit the arrestee promptly. Posts that have consular agents assigned within their districts should make maximum use of them in protecting the legal and human rights of incarcerated U.S. citizens and assuring their welfare. As a guide to what consular agents may be expected to do in such instances, posts should consult the Consular Agents' Handbook.
- b. The Department will consider a personal visit by a Consular Agent as also meeting the "Initial Visit" requirements in 7 FAM 423 provided:
  - (1) There are no apparent special problems or issues, such as alleged or apparent mistreatment, health, etc. that would make an immediate follow-up visit by a consular officer advisable.
  - (2) The Consular Agent has sufficient training and experience to perform the Initial Visit functions outlined in 7 FAM 423 below.
  - (3) The Consular Agent immediately forwards the necessary information to the post to permit entry of the case into ACS and sending the reporting telegram.

## 7 FAM 422.1-4 Visit by Volunteers

*(CT:CON-90; 09-03-2004)*

If an immediate personal visit by an officer or Consular Agent is not possible, you may consider enlisting cooperation of U.S. citizens residing in the area of the place of arrest to visit the detained U.S. citizen or national.

**Note:** Using a volunteer is an option of last resort. It should be used sparingly and, if time permits, in coordination with CA/OCS/ACS. In addition, this does not eliminate the responsibility to follow up with a personal consular visit as soon as possible, normally within a few days.

## 7 FAM 423 INITIAL VISIT

*(CT:CON-90; 09-03-2004)*

Your first consular visit to the prisoner, which in most cases is also the first contact outlined in 7 FAM 422.1 above, is designed to accomplish several goals, including:

### 7 FAM 423.1 Verification of Citizenship and Identity

*(CT:CON-90; 09-03-2004)*

Before rendering any substantial service to an arrestee, you must determine that the individual is a U.S. citizen national or otherwise entitled to the protection of the U.S. Government. For more details, see 7 FAM 415 on Citizenship and Dual Nationality.

### 7 FAM 423.2 Detecting Apparent or Alleged Abuse

*(CT:CON-90; 09-03-2004)*

This is often your best opportunity to question the prisoner about his/her treatment by authorities, examine him/her closely for signs of abuse, and take any statement he/she wish to make on the matter. For further information, see 7 FAM 425.

### 7 FAM 423.3 Explaining Your Role

*(CT:CON-379; 06-09-2011)*

Give the arrestee a realistic and positive understanding of your interest in and responsibility for a U.S. citizen or national in this situation.

- (1) It is useful at this point to make clear to the prisoner that the judicial system and personal rights he or she enjoyed in the United States do not apply abroad.



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- (2) Explain that a U.S. citizen or national is entitled to claim consular protection abroad, regardless of evidence of guilt, the nature of the alleged crime, or the status of the citizen.
- (3) While it is only fair to curb the prisoner's expectations that consular assistance will result in extraordinary intervention or miraculous remedies, you can and should emphasize the actions that can be taken on the arrestee's behalf.
- (4) Avoid any display of disdain, self-righteousness, or moral disapproval that might impair the relationship with the arrestee.

## **7 FAM 423.4 Delivering Attorneys List**

*(CT:CON-379; 06-09-2011)*

Provide the arrestee with a current list of attorneys that might be available to him/her. Explain you cannot recommend an attorney, but that you can point out those on the list who speak English, and those who either have some past experience in, or who have indicated a willingness to, defend a U.S. citizen or national accused of the same or similar crimes. Alternatively, provide the arrestee with an abbreviated list of those who speak English, have past experience in or are willing to defend a U.S. citizen or national accused of same or similar crimes. See 7 FAM 990.

## **7 FAM 423.5 Outlining the Judicial System**

*(CT:CON-90; 09-03-2004)*

Briefly explain to the prisoner the highlights of the judicial system within which the arrestee must work, and provide a written description that covers this topic in detail, including initial arrest, remand procedure, trial procedure, appeal process, and penal conditions and rules.

## **7 FAM 423.6 Obtaining Privacy Act Consent**

*(CT:CON-379; 06-09-2011)*

Because U.S. citizens or nationals or LPRs arrested abroad usually have family or friends who will inquire about the arrestee, you should attempt to obtain Privacy Act consent from the prisoner to pass information to persons likely to have an interest in the arrest. Such persons might include parents, brothers or sisters, close friends, attorneys, members of Congress, or the media. See Form DS-5505. It should be noted that this form is a guide to obtaining written consent, although other methods of clear written consent may also be acceptable.



## **7 FAM 423.7 Identifying Family and Persons to Contact**

*(CT:CON-379; 06-09-2011)*

- a. Advise the prisoner you will contact his or her next of kin, or other family or friends the arrestee designates. Often the arrestee may initially not wish to notify anyone, usually hoping for an early release. In this case, assure him/her that you will not contact anyone without his/her consent, but encourage him/her to provide the contact information anyway, so you have it available if he/she later changes his/her decision.
- b. A heterosexual or same-sex partner of the arrestee who was in a civil union or similar arrangement recognized by a U.S. jurisdiction will be treated the same as a "spouse" for purposes of this FAM section.

## **7 FAM 423.8 Protecting Prisoner's Personal Property**

*(CT:CON-90; 09-03-2004)*

In most countries, it is the practice of arresting officials to confiscate the personal property (such as money, clothing, watches, rings, computers, automobiles) of newly arrested persons. Often no receipts are given for these items, and, with no records, the items may disappear.

- a. During the initial visit to a U.S. citizen or national arrestee, you should ask the prisoner if the arresting authorities took any personal property, including a passport, and, if so, whether a signed and dated receipt was given in exchange.
- b. If the arresting authority did not follow these procedures, you should take immediate steps to determine the whereabouts of the confiscated items and to obtain a receipt acknowledging custody from the local authorities. Prompt action is necessary if the items are to be located and retrieved.
- c. You should not assume responsibility for holding or storing personal property or money on behalf of an arrestee (see 7 FAM 600).

NB: A U.S. passport is the property of the U.S. Government, not the bearer. If you have reason to believe the confiscated passport may disappear or be misused, you may request that local authorities turn it over to you for safekeeping.

## **7 FAM 423.9 Providing Minimal Personal Comfort Items**

*(CT:CON-379; 06-09-2011)*

- a. If such items are not normally provided the prisoner by arresting authorities, you should provide the kinds of items described in 7 FAM 415.5.

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- b. If the arrestee is in a local jail or other temporary holding facility that does not provide food for prisoners, provide the type of dietary supplement authorized under EMDA. (See 7 FAM 440.)

## **7 FAM 423.10 Photographing The Prisoner**

*(CT:CON-379; 06-09-2011)*

- a. Although not a requirement, the Department strongly recommends taking a few photos of the arrestee, as long as the host country authorities permit the taking of photos and the arrestee consents. These photos often prove useful for a number of reasons:
  - (1) They may serve as evidence in validating and protesting any allegations of physical abuse.
  - (2) They may help in identification and citizenship verification when there is reason to suspect the prisoner is using a false identity.
  - (3) They can provide some reassurance to family members regarding the arrestee's health and welfare.
- b. Generally one full-length and one passport-style close-up photograph is sufficient.
- c. If there are signs of abuse, or injuries sustained during the actual arrest, also photograph any bruises, cuts, abrasions etc. closely and carefully.
- d. If possible, use a digital camera, since this generally permits rapid electronic transmission to the Department and family members, and facilitates search of the Department's digitized photo database if applicable.

## **7 FAM 423.11 Obtaining Advance Information and Signatures**

*(CT:CON-379; 06-09-2011)*

You may find it useful, particularly in cases where the prison is some distance from post, and visitations are necessarily limited, to have certain forms and applications, in addition to the Privacy Act Waiver, completed and signed in advance by the arrestee. Be sure to explain that these documents will be held in your office for possible later use. These might include:

- (1) Passport application;
- (2) Power of attorney (for family or representative back in the United States);
- (3) EMDA loan application;
- (4) Repatriation Application;
- (5) Application for transfer under any relevant Prisoner Transfer Treaty (see 7 FAM 480);

## **7 FAM 423.12 Obligation of Host Government to Allow Visit**

*(CT:CON-379; 06-09-2011)*

Even where a foreign national arrestee has not requested a consular visit, the prison authorities must give consular officers access to the arrestee upon request and permit them to communicate with him/her, and to arrange for legal representation. If the arrestee does not want your assistance, you should insist to the prison authorities that they allow you the opportunity to confirm this fact directly through a face-to-face visit.

## **7 FAM 424 REPORTING AN ARREST**

*(CT:CON-379; 06-09-2011)*

It is imperative that you submit prompt and comprehensive reports in the American Citizen Services (ACS) automated system on the arrest and detention of any U.S. citizen or national that involves any one of the following factors:

- (1) Detention over 24 hours;
- (2) Physical abuse or denial of human rights; or
- (3) Circumstances that in your judgment involve special public relations or human rights considerations.

### **7 FAM 424.1 Timing**

*(CT:CON-379; 06-09-2011)*

You must transmit the arrest report to the Department within 24 hours of the receipt of notification of the arrest, even if all items on the format cannot be completed. The initial report can be by e-mail but must also be entered in the ACS system. You must submit a follow-up report in the ACS system to supply missing data. Prompt reports to the Department are absolutely necessary because:

- (1) Families and friends of the arrestee and Members of Congress usually call the Department for information and assistance as soon as they receive word of an arrest. If the Department does not have this information, especially if the inquiry comes several days after an arrest, inquirers receive the impression that we do not care.
- (2) It is clearly preferable that the family learns of an arrest from the consular officer or the Department, rather than from the news media.
- (3) Inquiries about arrests on which the Department has no information, especially if received several days after the arrest, are a source of embarrassment and can reflect badly on the Department and its overseas

posts.

## **7 FAM 424.2 Follow-Up Reporting**

*(CT:CON-379; 06-09-2011)*

- a. Posts should keep the Department (CA/OCS/ACS) advised of all new developments in a case and should report immediately in the ACS system:
  - (1) Any change in any item of the initial arrest report.
  - (2) Whenever a consular visit occurs.
  - (3) When the post learns that a prisoner has been sentenced or released.
- b. You should report fines in both local currency and U.S. dollars.
- c. You should include date of release and conditions (provisional, unconditional, completion of sentence, and any other relevant data) when reporting about a prisoner's release.
- d. When submitting follow-up reports, posts may use an abbreviated format of the initial arrest report by referring to the pertinent item number and reporting the change.

## **7 FAM 425 ABUSE AND MALTREATMENT**

*(CT:CON-379; 06-09-2011)*

Abuse is an unfortunate reality that can occur even in the most advanced police and penal systems for any number of reasons, including:

- (1) Unauthorized and inappropriate punishment for resisting arrest;
- (2) Attempts to extract a confession or admission of guilt through torture;
- (3) An authorized or unauthorized process of "softening up" arrestees to render them more controllable during incarceration;
- (4) Reactions to a perceived display of improper attitude or disrespect on the part of the arrestee;
- (5) Gratuitous acts by detention authorities with sadistic tendencies or a propensity towards violence;
- (6) A reaction to cultural or language differences and misunderstandings;
- (7) Xenophobia, racism, prejudice, etc.

NB: Regardless of the reason, or lack of reason, it is the Department's position that acts of abuse against U.S. citizen or national detainees are intolerable, and require prompt and appropriate action by the consular officer and the post.

## **7 FAM 425.1 Identifying Abuse**

*(CT:CON-379; 06-09-2011)*

Abuse, alleged, potential, or actual, might come to your attention in a number of ways:

- (1) Allegations by the Arrestee: In the first contact with a prisoner, whether in person or by phone, you should try to determine from the prisoner if there has been any physical abuse or violation of rights.

NB: Whenever a prisoner alleges physical abuse, and the first contact was not by a personal consular visit, a consular officer must see the prisoner at the earliest possible opportunity.

- (2) Physical Evidence: You should verify during the initial visit and any follow-up visits whether there are any marks or signs of abuse such as bruises, scratches, cuts, marks, bandages, etc. Even if the arrestee does not raise any allegations of abuse, you should question the arrestee, preferably in private, about the reasons for any wounds or marks you notice.

FYI: You should also bear in mind that many forms of physical abuse, including psychotropic drugs and systematic torture, are calculated to leave no physical evidence. Torture by electric shock and various forms of "water treatment" are two of the more common methods that normally do not leave marks.

- (3) Statements by other prisoners: Other prisoners, particularly other U.S. citizen or national prisoners with whom you have developed a dialogue, may approach you and allege abuse of a U.S. citizen or national arrestee.
- (4) Preemptory statements by detaining officials: At times, a guard, warden, or other official might offer the unsolicited comment that a certain prisoner "hurt himself," "fell," or was "attacked by other prisoners." These comments may later prove to be an attempt to "explain away" abuse of the arrestee by detaining authorities.

## **7 FAM 425.2 Verify or Substantiate the Abuse**

### **7 FAM 425.2-1 Obtain a Written Statement**

*(CT:CON-379; 06-09-2011)*

Encourage the prisoner to make a formal declaration under oath or sign a written statement about the abuse. Merely requesting such a declaration or statement may often prevent false or exaggerated allegations of abuse. The documents may be useful should the consular officer protest the maltreatment to host country authorities. The statement or declaration should include:

- (1) When and where it occurred;
- (2) A detailed description of the abuse;
- (3) Identities of participants, if known;
- (4) Potential witnesses (other prisoners, officials present but not participating, etc.); and
- (5) Any residual effects, such as pain, nausea, etc.

### **7 FAM 425.2-2 Arrange a Medical Examination**

*(CT:CON-379; 06-09-2011)*

If possible, have the prisoner examined by a private medical doctor to determine the extent and probable cause of any injury. Emergency medical/dietary assistance (EMDA) funds may be used for this examination provided all the relevant criteria are met (see 7 FAM 443). Consider requesting assistance from the RMO or embassy physician or nurse practitioner when you can't get a private doctor. As a last resort, request examination by the prison doctor. Approval by CA and Medical Services (MED) must be obtained before the Regional Medical Officer (RMO), Regional Psychiatrist (RMO/P), or Foreign Service Health Practitioner (FSHP) may examine or observe a U.S. citizen prisoner. Many host countries will not grant such requests and are not required to do so. See also 16 FAM 112e. CA/OCS/ACS will coordinate clearance with MED.

### **7 FAM 425.2-3 Evaluate Unsubstantiated Allegations**

*(CT:CON-379; 06-09-2011)*

Occasionally, an arrestee may allege abuse when none has occurred, usually from the notion that this may expedite his or her release, or get him or her transferred to a more hospitable environment such as a prison clinic or hospital. While any allegation of abuse must be taken seriously, it is essential that you exercise judgment on the basis of all evidence at hand, including:

- (1) Your own in-depth interview of the arrestee;

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- (2) The general likelihood of abuse given your knowledge of the penal system and the arresting authorities;
- (3) Your assessment of the prisoner's credibility based on past experience (generally useful only with longer-term prisoners); and
- (4) Presence or absence of any physical indicators.

## **7 FAM 425.3 Maltreatment**

*(CT:CON-379; 06-09-2011)*

Although the term "maltreatment" is somewhat interchangeable with "abuse," in this context it refers to an ongoing detrimental condition of incarceration, as opposed to a specific act. Examples include:

- (1) Diet that does not meet subsistence levels;
- (2) Inadequate shelter or heat;
- (3) Inadequate clothing, or the lack of opportunity to keep clothing reasonably clean;
- (4) Improper confiscation or theft of a prisoner's personal property;
- (5) Denial of, or inadequate, medical attention;
- (6) Lack of minimal bedding;
- (7) Gross overcrowding of facilities or individual cells; and
- (8) Excessively lengthy pre-trial detention.

## **7 FAM 425.4 Consular Actions**

*(CT:CON-379; 06-09-2011)*

Prison conditions vary widely, particularly from country to country, but also often within a country. You should be alert to general conditions of incarceration as well as monitor ongoing cases for possible maltreatment. Your activities in this area should include:

- (1) Determine in advance jail or prison conditions at the most likely facilities.
- (2) Have a working knowledge of the level of medical care offered prisoners in general, including any substance abuse rehabilitation or treatment.
- (3) Identify those facilities you believe would be best suited for U.S. citizen or national prisoners. This may prove helpful if at some point you have some input into the host government's placement of a specific prisoner.
- (4) At the time of your initial visit to each arrested U.S. citizen or national, observe the physical conditions under which the prisoner is being held. If the conditions do not meet generally accepted international standards:



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- (a) Attempt to obtain improvement through direct intervention with the responsible prison authorities.
- (b) If this does not achieve results, consider formal protests at the local, state, or national level. (See 7 FAM 426.)

FYI: For a further discussion of prison conditions, see Section 7 FAM 460 Prolonged Imprisonment.

## **7 FAM 426 PROTESTS**

### **7 FAM 426.1 Purpose**

*(CT:CON-407; 06-29-2012)*

- a. Prior approval by the Department is generally required before a post takes action to protest lack of consular access and notification; protest mistreatment of a prisoner, or protest any other host-country action based on treaty provisions or international law. CA/OCS/L will coordinate clearance with the Office of the Legal Adviser. CA/OCS/ACS will coordinate clearance with the regional bureau.
- b. If the legal and human rights of U.S. citizens and nationals arrested abroad are to be adequately protected, we must be prepared to protest substantiated violations of those rights. The purposes of such protests include:
  - (1) Protecting U.S. citizen prisoners against further abuse or violation of their rights;
  - (2) Impressing on the host government that the U.S. Government is seriously concerned about the welfare of its citizens and nationals and will not condone or tolerate violation of their rights;
  - (3) Protecting future U.S. citizen detainees against similar maltreatment; and
  - (4) Improving the general level of treatment of U.S. citizens and nationals arrested and detained in foreign countries.

NB: Experience demonstrates that a well-conceived and executed system of protests can often achieve these objectives in many countries. Failure to protest when the situation warrants only tends to perpetuate abuse.

### **7 FAM 426.2 Actions Meriting Protest**

*(CT:CON-379; 06-09-2011)*

The following are the most frequent grounds for protests:

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NB: This list is not intended to be all-encompassing. If you have an unusual situation, or are not sure whether a specific set of circumstances warrant a protest, or if there is a difference of opinion within the mission whether to protest, you are strongly encouraged to contact the Department CA/OCS/ACS for consultation and guidance.

## **7 FAM 426.2-1 Failure to Notify**

*(CT:CON-434; 01-24-2013)*

Whenever host government authorities fail to notify the post of the arrest of a U.S. citizen or national in a timely manner, the post should advise the Department promptly, seek its clearance, and protest immediately upon receiving the Department's clearance as described in 7 FAM 426.4. Use the following guidelines in preparing the protest:

- (1) Were arresting authorities aware that the arrestee was or claimed to be a U.S. citizen or national?
- (2) If the host country is a party to the VCCR and there is no bilateral consular agreement requiring notification regardless of whether the arrestee requests such notification:
  - (a) Protest if host government authorities failed to notify the post within 72 hours of the arrest;
  - (b) Do not protest, however, if you know that the arrestee asked that U.S. consular authorities not be notified after being advised that he or she had a right to have them notified;
  - (c) You should reference Article 36 of the VCCR in the protest.
- (3) If there is a bilateral consular agreement requiring notification whether or not the arrestee requests such notification:
  - (a) Protest if host government authorities failed to notify the post within the specific time period provided by the agreement; or
  - (b) Protest, if the agreement does not provide a specific time period (i.e., if it only says "immediately" or "without delay" without specifying a specific number of hours or days), if host government authorities failed to notify the post within 72 hours. Protests should be cleared by CA/OCS/L ([ASK-OCS-L@state.gov](mailto:ASK-OCS-L@state.gov)) which will coordinate with L/CA before they are delivered to the host government;
  - (c) You should reference the bilateral consular agreement in the protest. The bilateral consular agreements, and information on their respective time limits, appear in Table A of the Consular Notification and Access Manual. The manual also contains detailed information on the VCCR and customary international law on consular notification.

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- (4) If the country is neither a party to the VCCR nor a party to a bilateral consular agreement (i.e., Afghanistan, Burundi, Central African Republic, Chad, Comoros, Congo-Brazzaville, Côte d'Ivoire, Guinea-Bissau, Nauru, Palau, San Marino, Swaziland, and Uganda), you should protest as described in paragraph (2) above, referencing customary international law as reflected by Article 36 of the VCCR.
- (5) The protest should include a request for an investigation of the notification violation.
- (6) The protest should request a response from the investigating authority within a specified time, such as 10 days or 2 weeks.

NB: It is not necessary to obtain the permission of the prisoner before protesting a notification violation.

## **7 FAM 426.2-2 Abuse or Maltreatment**

*(CT:CON-379; 06-09-2011)*

- a. Verify to the extent possible the prisoner's allegations of abuse or maltreatment at the hands of host government authorities (see 7 FAM 425.1 and 425.3).
- b. Gain the prisoner's permission to protest the abuse or mistreatment. Although some abused or maltreated prisoners refuse such permission out of fear of reprisals, make every effort to persuade them to permit a protest.
  - (1) Point out that it is difficult for you to protect the arrestee from further harm if you cannot protest.
  - (2) Explain it is especially important to protest in consular districts where abuse or maltreatment is chronic; otherwise, the practice will never cease.
- c. If circumstances warrant, and the prisoner's detention is likely to be of short duration, consider a compromise with a reluctant prisoner to allow you to protest after his or her release.

NB: In the absence of a prisoner's permission to protest, do not make any protest without first consulting the Department.

- d. Report the abuse or mistreatment to the Department (CA/OCS/ACS) immediately:
  - (1) Describe the nature and seriousness of the abuse or mistreatment;
  - (2) Provide the prisoner's stated or implied reasons for refusing permission; and
  - (3) Provide your own opinion as to whether the nature of the abuse and mistreatment, and the potential effects on other U.S. citizen or national arrestees, warrants a protest regardless of the arrestee's refusal.

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- e. When making a protest, request an investigation and a report of the findings within a specified period of time.

## **7 FAM 426.2-3 Obstructing Consular Access to a Prisoner**

*(CT:CON-379; 06-09-2011)*

- a. While visiting consular officers cannot be restricted in the questions they pose to the arrestee, consular access and communication generally must be exercised subject to local laws and regulations. You can expect a certain amount of host government regulation and formality associated with a prison visit, and should be prepared to follow the rules in a professional manner. For example, you may be required to visit during established visiting hours, and may, in accordance with local laws and regulations and applicable prison rules, be prevented from taking in prohibited items.
- b. Nevertheless, under the Vienna Convention on Consular Relations (VCCR) and many bilateral consular agreements, such laws, regulations, and rules must not be so restrictive as to defeat the purpose of consular access and communication. In this vein, you should consider protesting actions or requirements, which seem unnecessarily onerous or arbitrary and prevent you from performing your responsibilities effectively. These could include:
  - (1) Refusal to allow first consular visit within a reasonably short period of time;
  - (2) Excessive bureaucratic requirements to obtain permission for visits, particularly those requiring long lead times;
  - (3) Less access or more rigid requirements than those imposed on visiting family members or attorneys;
  - (4) Moving or otherwise making the prisoner unavailable on pre-scheduled visit days;
  - (5) Arbitrarily confiscating documents or information materials;
  - (6) Moreover, under bilateral consular agreements with certain countries, the prison authorities are required to allow you and the arrestee to converse in private. These are listed on page 34 of the Consular Notification and Access Manual.

## **7 FAM 426.2-4 Undue Interference With Communications Between Prisoner And Consular Officer**

*(CT:CON-379; 06-09-2011)*

- a. While a totally private conversation between prisoner and consular officer is the preferred arrangement, this is often not realistic. Many countries, including the United States, place varying restrictions on the privacy of prison visits for security and law enforcement reasons, although under bilateral consular agreements with certain countries, the prison authorities are required to allow

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you and the arrestee to converse in private. These are listed on page 34 of the Consular Notification and Access Manual.

- b. In deciding whether “undue interference” exists in your efforts to have a reasonably private conversation with a prisoner, you need to determine whether the monitoring is done:
  - (1) Primarily for security; or
  - (2) To intimidate the U.S. citizen or national prisoner; and/or
  - (3) To hinder your performance of legitimate consular functions;
  - (4) Things to consider include:
    - (a) Is the monitoring only visual, or visual and auditory? Normally the presence of a guard who can observe but not overhear the conversation is not problematic.
    - (b) Is the monitoring discriminatory – that is, is it primarily because of the prisoner’s nationality or your position?
    - (c) How does it compare to monitoring of visits by other individuals, particularly prisoners’ attorneys and consular officers from other countries visiting their nationals?
    - (d) Is the monitoring intrusive? Does the person or persons doing the monitoring interrupt your conversation, make comments of their own or make threatening statements or gestures towards you or the prisoner?
    - (e) Are there reprisals against a prisoner for complaints of abuse or maltreatment or other concerns raised about the conditions of imprisonment?
    - (f) Do authorities insist that communications between the consular officer and the arrestee be in the local language, when that is not English?

## **7 FAM 426.3 Type And Manner Of Protest**

*(CT:CON-379; 06-09-2011)*

- a. Protests may be formal or informal, and either written or oral.
- b. The level at which the protest is made and the method are normally left to the post’s discretion, based on such factors as:
  - (1) The status of the bilateral relationship;
  - (2) The nature and seriousness of the offending activity;
  - (3) Past experience with similar protests;
  - (4) Whether the offending activity reflects the policy of the host government, or the decision of a particular official;

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- (5) The degree of urgency. For example, while the conduct may warrant a Diplomatic Note, a personal call may provide quicker results.

FYI: One effective strategy is to protest first at a lower level and, if no satisfactory response is received, to escalate the protest to the state or federal level.

For a sample diplomatic note of protest, see 7 FAM Exhibit 426.3.

NB: If the country of arrest has entered into a bilateral consular agreement with the United States, that agreement should normally be used in place of the more general VCCR as the basis for a protest concerning notification or access, particularly when the treaty contains specific time limits and notification requirements. If the country is neither a party to a bilateral consular agreement or the VCCR, the basis for protest should be customary international law.

## **7 FAM 426.4 Reporting Proposed Protests**

*(CT:CON-407; 06-29-2012)*

Report all proposed protests to the Department (CA/OCS/ACS) by telegram to permit the Department to decide whether protest is appropriate. CA/OCS/ACS will coordinate with CA/OCS/L, L/CA, CA/P, and the regional bureau in preparing guidance for post regarding the proposed protest. This is important from both a policy and legal perspective as not all actions inconsistent with a treaty or bilateral agreement constitute a violation. It is also important to ensure uniformity with the Department's responses to the converse scenario, where U.S. Federal, State, or local law enforcement may commit the same alleged violation and the foreign government lodges a protest with the Department. Reporting should detail:

- (1) The circumstances that warranted the protest; and
- (2) The type of protest, when and where it is proposed to be made, and to whom.

## **7 FAM 426.5 Reporting Lodged Protests**

*(CT:CON-379; 06-09-2011)*

Once a protest is lodged as described in 7 FAM 426.4, you should report it to the Department (CA/OCS/ACS) by telegram to permit the Department to decide on what follow-up action might be appropriate. Reporting should detail:

- (1) The circumstances that warranted the protest;
- (2) The type of protest, when and where it was made, and to whom;
- (3) Any timeframe given for investigation; and
- (4) The response to, or results of, the protest.

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## **7 FAM 427 THROUGH 429 UNASSIGNED**

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## **7 FAM EXHIBIT 426.3**

### **Sample of a Diplomatic Note of Protest**

*(CT:CON-379; 06-09-2011)*

No. 17

The Embassy of the United States of America presents its compliments to the Ministry of Foreign Affairs and has the honor to bring to the attention of the Ministry of Foreign Affairs the following:

On April 27, American citizen Robert David Johnson reported that he had been beaten by two police officers in Erehwon. Mr. Johnson reported that a dispute arose about his restaurant bill at the restaurant "Papa's" on Wednesday evening, April 18. According to Mr. Johnson, the waitress refused to provide or explain the individual charges, giving only the total of \$57. Mr. Johnson refused to pay the bill without further explanation. Mr. Johnson reported that the police arrived a short time later and beat him with nightsticks. He was then taken to the police station where he was again beaten and locked in a cell.

The Embassy did not learn of Mr. Johnson's arrest until the following Tuesday, April 24, one week later, when a former fellow prisoner of Mr. Johnson's delivered a note to the Embassy from him. An Embassy officer immediately contacted the Erehwon Municipal Jail where Mr. Johnson reported he was being held. Chief of Police Thompson confirmed Mr. Johnson's detention but denied the Embassy officer's request for immediate access. He said that no one would be allowed to see Mr. Johnson until the judge had questioned him. Subsequent requests for access to Mr. Johnson were also denied.

An Embassy officer finally interviewed Mr. Johnson on Friday, April 27, after he was released. At that time, Mr. Johnson reported his mistreatment at the hands of the police. He showed the Embassy officer faded bruises on his back and ribs and pointed out two partially healed cuts on his face, which he said, were the results of police abuse.

This is clearly in violation of article 36 of the Vienna Consular Convention to which both the United States of America and the Republic of Anyland are signatory.

Or

The U.S.-Anyland consular convention requires the receiving state to notify the sending state within forty-eight hours of the arrest of a national from the sending state and provide access within forty-eight hours of notification. The embassy respectfully requests that the Ministry of Foreign Affairs investigate the physical mistreatment of Mr. Robert Johnson and provide the results of its investigation to the embassy. It is further requested that the Ministry of Foreign Affairs take appropriate measures to ensure that other instances of mistreatment of Americans do not occur.

The embassy also wishes to protest the failure of the police to notify the embassy of Mr. Johnson's arrest and their refusal to provide prompt access to him.

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The embassy respectfully requests that the Ministry of Foreign affairs inform all law enforcement agencies of their obligations under (the Vienna Convention on Consular Relations) or (the u.s.-anyland consular convention.)

The embassy of the United States of America avails itself of this opportunity to renew to the Ministry of Foreign Affairs the assurances of its highest consideration.  
Embassy of the United States of America, Erehwon, April 30, 2002.

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